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Nos. 590-591

In the Supreme Court of the United States

October Term, 1946.

F. A. GILLESPIE AND SONS COMPANY, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR REHEARING FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1946.

Nos. 590 and 591.

F. A. GILLESPIE AND SONS COMPANY, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR REHEARING FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now, F. A. Gillespie and Sons Company, the petitioner in the above entitled cases, and presents this its petition for rehearing on its application for petition for writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit in Cases Nos. 3180 and 3181 in said Circuit Court of Appeals and in support thereof respectfully shows that:

The court erred in its conclusion that the petition for writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit should be denied in the following manner, to-wit:

Petition for writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit was filed in the Supreme Court of the United States, October Term, 1946, on the 9th day of October, 1946, and thereafter on the 18th day of November, 1946, the Supreme Court of the United States denied the petitioner's petition for said writ of certiorari. The court erred in denying the said application of the petitioner for writ of certiorari for the following reasons:

I.

The decision of the court below is in conflict with the decision of the *Pittsburg Brewing Company* case, 107 F. (2d) 155, decided by the Circuit Court of Appeals for the Third Circuit and the court below is also in conflict with the *New England Life Insurance Company* v. *Welch,* 153 F. (2d) 260, decided by the Circuit Court of Appeals for the Second Circuit.

II.

The court below, in petitioner's cases, has decided an important question of Federal income tax law which is in conflict with the Circuit Courts of Appeal for the Second and Third Circuits and in view of the importance of the questions of interest deductions and excessive depreciation deductions made in prior years and added to taxpayer's current year's income and taxed as a profit should be authoritatively settled by this Court.

The court below has decided that excessive depreciation and depletion deductions taken in prior years constitute gain or profit on income in subsequent years, which petitioner urges is violative of the Sixteenth Amendment to the Constitution.

Wherefore, petitioner prays that this Court grant a rehearing on petitioner's petition for writ of certiorari and upon a rehearing enter an order granting the petition for

writ of certiorari; in support of which a brief is filed concurrently herewith.

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December 9, 1946.

CERTIFICATE OF COUNSEL.

The undersigned, record counsel for the appellant herein, does hereby certify and declare that the petition for rehearing filed in the proceeding in the instant cases is filed in good faith and not for any purposes of delay or injustice.

.....
HAROLD E. RORSCHACH,
Attorney for Appellant.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

A statement of the opinion below, jurisdiction and questions presented is contained in the petition for writ of certiorari and is not repeated here, for which reference is made to pages 6, 7, 8 and 9 of the printed copy of the petition for writ of certiorari.

In these cases, excessive deductions for depreciation taken in 1935 and 1936 and from which the taxpayer received no tax benefit, was added by the Commissioner of Internal Revenue to the taxable profit when taxpayer sold its oil properties in the year 1937. The Tax Court approved the Commissioner's determination and was affirmed by the Circuit Court of Appeals, relying upon the 5 to 4 decision

of this Court in the *Virginian Hotel Company* v. *Helvering*, 319 U. S. 523. Reversal of the 5 to 4 decision in the *Virginian Hotel Company* case has been recommended by the American Bar Association, the American Institute of Accountants, and has been criticized by The Tax Committee of the American Mining Congress. (Appendix of Petition for Writ.)

The *Virginian Hotel Company* case placed a construction on the word "allowed" as opposing the construction of the word "allowed" in the *Pittsburg Brewing Company* case. Such construction was placed by this Court on the word "allowed" only in event the excessively depreciated property was owned and retained by the taxpayer for the current taxable year. Construction of the word "allowed" was not determined in the *Virginian Hotel Company* case in event of the sale of the depreciable property.

We do not believe that the majority of this Court intended the extension of the doctrine in the *Virginian Hotel Company* case where the property was sold as it was here and the excessive prior years' deductions added to income in the year of sale and it was not open to the taxpayer in that case to make the point which we make here that the Sixteenth Amendment to the Constitution authorizes only a tax on "income" and that income in a current year is not created by excessive and the illegal deductions taken in prior years which neither produces net income, benefits the taxpayer nor prejudices the Treasury.

Taxpayer has been taxed in 1937 on $21,624.37 excessive depreciation and depletion deductions for 1935 and 1936. Taxpayers never received one cent on account of these paper deductions and it would have been as well off if it had not taken them and was no richer by taking them. In short, these excessive deductions were not income in any year, much less in 1937, and this Court should not sustain the imposition of a 1937 income tax thereon.

It would seem startling and shocking that in a field of law which is so important such a vital question would be

conclusively determined without, (*a*) full opportunity for the litigants to be heard in all of the ways prescribed by law, one of which is by oral arguments in the Court; and (*b*) a careful examination of the case on the merits.

Excessive deductions in prior years which did taxpayer no good and the revenue no harm cannot be added to later years' income and do not fall within the definition of "gross income" as provided for in Section 22(a) of the Internal Revenue Code.

All of which is respectfully submitted,

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